

NO. 82-1830

JUN 16 1982

ALEXANDER L STEVENS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1982

STEVEN BROWN, and
BOARD OF TRUSTEES OF THE PUBLIC
LIBRARY OF DES MOINES, IOWA,

Petitioner,

vs.

DAN L. JOHNSTON, Polk County Attorney, and
GERALD SHANAHAN, Chief, Division of
Criminal Investigation of the Iowa Depart-
ment of Public Safety, State of Iowa,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an Article III case or controversy is present in a proceeding challenging a subpoena where there is no present effort to enforce the subpoena, the underlying investigation has been terminated, and there is no substantial likelihood of that another similar subpoena will be issued?
2. Whether claimed "chilling" effect of gathering of information by law enforcement authorities without allegation of specific, concrete and immediate injury establishes an Article III case or controversy?
3. Whether a substantial constitutional question is raised by a unanimous Iowa Supreme Court opinion which holds that the State's interest in a specific, bona fide criminal investigation outweighs the general First Amendment or privacy interest of library patrons?

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents Dan L. Johnston, Polk
County Attorney, and Gerald Shanahan,
Chief, Division of Criminal Investigation
of the Iowa Department of Public Safety,
State of Iowa, respectfully submit this
Brief in Opposition to Petitioner's prayer
for a Writ of Certiorari in the above
captioned matter.

ADDITIONAL CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED

In addition to constitutional and statutory citations presented by Petitioner, Petition for Writ of Certiorari at 3, the following provisions are directly involved:

Constitution of the United States:
Article III, Section 2.

The judicial power shall
extent to all Cases . . .
[and] Controversies . . .

Statutory Provision:

Iowa Code Section 802.3:

Felony--aggravated or serious
misdemeanor. In all cases,
except those enumerated in sec-
tion 802.1, an indictment or
information for a felony or
aggravated or serious misdemeanor
shall be found within three years
after its commission.

COUNTERSTATEMENT OF THE CASE

Respondents accept and adopt Peti-
tioners' Statement of the Case, Petition

for Writ of Certiorari, at 5-10 as far as it goes. In addition, however, Respondents state that since the action was first begun, the statute of limitation applicable to the crimes under investigation has now expired, Section 803.2, Code of Iowa (1983) (Opposition Appendix at A-1, hereinafter referred to Opp.App.), that cattle mutilations cease to be a problem for law enforcement in Polk County, Affidavit of Dan Johnston, (Opp.App. at A-4) and that the investigation which resulted in the subpoena which formed the basis of this lawsuit has now terminated. Id.

SUMMARY OF ARGUMENT

1. Because the investigation which led to the challenged subpoena of library records has terminated, no Article III case or controversy is present.
2. Even if this case were not moot, which it is, the alleged "chilling" effect of data gathering by law enforcement authorities does not establish a case or controversy within Article III.

3. The unanimous opinion of the Iowa Supreme Court applied the consistent holdings of this Court in finding that the State's interest in a bona fide criminal investigation outweighs whatever First Amendment or privacy interests of library patrons are implicated.

REASONS WHY THE WRIT SHOULD
NOT BE GRANTED

1. Because the investigation which led to the challenged subpoena of library records has terminated, no Article III case or controversy is present.

This Court since the very beginning has recognized that its jurisdiction is limited to actual "cases or controversies" that are presented to it, Hayburn's Case, 2 Dall. 409 (1796), particularly where constitutional questions are involved. Hall v. Beals, 396 U.S. 45 (1943). Because no case or controversy is presented here, certiorari should be denied.

Petitioners challenge a subpoena that was issued on November 27, 1979. At the time, law enforcement officials in Polk

County hoped that information obtained could help focus an investigation of bizarre cattle mutilations occurring in the Polk County area. Brown v. Johnston, 328 N.W.2d 510, 511 (Iowa 1983)

The statute of limitations has now run on whatever crimes may have occurred. Under Iowa law, the maximum period in which a criminal action may be brought for any crime except murder is three years. See Section 802.3, Code of Iowa, 1983 (Opp.App. at A-1). As a result, the Polk County Attorney's office has closed the investigation. See Affidavit of Dan Johnston, Polk County Attorney (Opp.App. at A-4).

In addition, it appears that the cattle mutilation problems have terminated in Polk County. Johnston Affidavit, Opp.App. at A-4. There is thus no substantial argument that the legal questions raised in this proceeding are "capable of

repetition, yet evading review," Roe v. Wade, 410 U.S. 113 (1973); Southern Pacific Terminal Co. v. I.C.C., 219 U.S. 488 (1911).

2. Even if the cause were not moot, which it is, the alleged "chilling" effect of data gathering by police authorities does not establish a case or controversy within Article III.

Law enforcement officials in Polk County, through their subpoena, simply sought to gather information that might be of assistance in their criminal investigation. At the time the subpoena was issued, the records involved were public records under Iowa's Open Records Act, Chapter 68A, Code of Iowa (1981). This Court has held, that the mere gathering of information by government authorities does not provide a case or controversy, Laird v. Tatum, 408 U.S. 1 (1971), reh'g denied 409 U.S. 901 (1972). As was noted in Tatum, "Allegations of subjective 'chill' are not an

adequate substitute for a claim of specific present objective harm or a threat of specific future harm." 408 U.S. at 13-14. In this case, Petitioners make no allegation of specific tangible loss such as loss of employment. Socialist Workers Party v. Attorney General, 419 U.S. 1314, 1317-19 (1974) (Marshall, J., in chambers). The rule in Tatum is thus clearly applicable here, and is ample grounds to defeat Petitioner's certiorari effort.

Given the abstract character of their interests, petitioners have serious standing problems. Like bankers who compile records of patrons, library trustees lack standing to vicariously assert the rights of third parties, California Bankers v. Schultz, 416 U.S. 21 at 68-9 (1974). And, petitioner Steven Brown lacks standing since he has not alleged he is within the class of patrons whose library records are

within the scope of the challenged subpoena. Id. at 57. The lack of real, immediate, conflicting interests makes this case an unattractive vehicle for adjudication of constitutional issues.

3. Whether a substantial constitutional question is raised by a unanimous Iowa Supreme Court opinion which holds that the State's interest in a specific, bona fide criminal investigation outweighs the general First Amendment or privacy interest of library patrons?

A final reason for denial of certiorari, in addition to the clear obstacles to constitutional adjudication cited above, is the conventional character of the unanimous opinion of the Iowa Supreme Court. This Court has clearly held that general First Amendment and privacy interests in nondisclosure of information must be subordinated to the specific interest of society involved in criminal justice investigations. Nixon v. United States, 418 U.S. 683 (1973); Branzburg v. Hayes, 408 U.S.

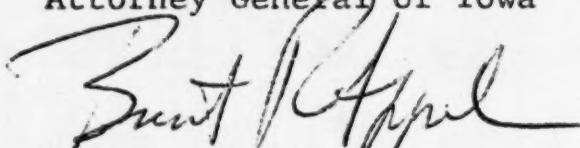
665 (1972). And, where cattle mutilation is concerned, there is no significant likelihood that the State is engaged in constitutionally improper First Amendment content censorship in the guise of regulation of conduct. Contrast Cohen v. California, 403 U.S. 15 (1971)

CONCLUSION

For the above cited reasons, Respondents pray that the Petition for Writ of Certiorari in the above captioned matter be denied.

Respectfully submitted,

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Attorney General of Iowa



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APPENDIX A

Section 802.1-4, Code of Iowa (1983)

802.1

Murder. A prosecution for murder in the first or second degree may be commenced at any time after the death of the victim.

802.2

Repealed by 81 Acts, ch. 204,
§ 12.

802.3

Felony--aggravated or serious misdemeanor. In all cases, except those enumerated in section 802.1, an indictment or information for a felony or aggravated or serious misdemeanor shall be found within three years after its commission.

802.4

Simple misdemeanor--ordinance. A prosecution for a simple misdemeanor or violation of a municipal or county rule or ordinance shall be commenced within one year after its commission.

APPENDIX B

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Criminal Investigation of the Iowa Depart-
ment of Public Safety, State of Iowa,

Respondents.

AFFIDAVIT

I, Dan L. Johnston, being first duly sworn,
state as follows:

1. That I am a Respondent in the
case of Steven Brown and Board of Trustees
of the Public Library of Des Moines, Iowa,
Petitioner, vs. Dan L. Johnston, Polk

County Attorney, and Gerald Shanahan, Chief, Division of Criminal Investigation of the Iowa Department of Public Safety, State of Iowa, Respondents.

2. That I am the duly elected Prosecuting Attorney for Polk County, Iowa.

3. That on November 27, 1979, an application for a County Attorney's Subpoena Duces Tecum under Rule 5(6) of the Iowa Rules of Criminal Procedure, was presented to the Iowa District Court by a member of my staff, requested the issuance of such a subpoena for information contained in certain records in the possession of the Public Library of Des Moines, Iowa.

4. That on November 27, 1979, after reviewing such application, the Iowa District Court issued a Subpoena Duces Tecum directing the Custodian of Records of the Des Moines Public Library to release the requested information.

5. That the requested information was sought as part of an ongoing criminal investigation into the mutilation of cattle then occurring in Polk County, Iowa.

6. Cattle mutilations are no longer a problem in that the activity has terminated in Polk County, Iowa.

7. The statute of limitations, Section 802.3, Code of Iowa, has expired on the crimes that were the subject of previous investigation.

8. That this criminal investigation is no longer active and the matter is now closed.

9. That the Polk County Attorneys Office is no longer attempting to enforce the Subpoena Duces Tecum issued on November 27, 1979.

DAN L. JOHNSTON
Polk County Attorney

A-5

STATE OF IOWA)
) SS:
COUNTY OF POLK)

Subscribed and sworn to before me on
this ____ day of _____, 1983.

SHIRLEE J. VANDERVORT
Notary Public for the
State of Iowa